

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELPIDIO JUAREZ,

Plaintiff,

v.

LYNN M. WASHETAS,

Defendant.

ORDER

13-cv-573-bbc

Plaintiff Elpidio Juarez, a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, has submitted a proposed complaint under 42 U.S.C. § 1983. With the exception of habeas corpus proceedings, the fee for civil actions filed after May 1, 2013, is \$400 unless a litigant qualifies as indigent under the federal *in forma pauperis* statute, 28 U.S.C. § 1915(a), in which case the fee is \$350. Plaintiff has filed a copy of his six-month trust fund account statement in support of his motion for leave to proceed *in forma pauperis* in this case. (Dkt. # 3). After considering the request and supporting documentation, the court concludes that plaintiff qualifies for indigent status.

Because plaintiff is incarcerated, his case is governed by the Prisoner Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b), which requires indigent inmates to pay by installment the entire filing fee for civil actions and appeals. The federal *in forma pauperis* statute does not permit a court to waive a prisoner's entire obligation to pay filing fees, but it does allow a qualifying individual to proceed without prepaying some or all of the filing fee. To determine whether a prisoner qualifies for indigent status for purposes of the PLRA, this court applies the formula set forth in 28 U.S.C. § 1915(b)(1). According to this formula, a prisoner requesting leave to proceed *in forma pauperis* must prepay 20% of the greater of the average monthly balance or the average monthly deposits made to his prison account in the six-month period immediately

preceding the filing of the complaint. In other words, he must make an initial partial payment of the filing fee before the court will consider his complaint. Thereafter, he shall be required to make monthly installment payments from his trust fund account. 28 U.S.C. § 1915(b)(2).

Using information from plaintiff's trust fund account statement, 20% of the average monthly deposits to plaintiff's account is \$7.74, but 20% of plaintiff's average monthly balance is \$103.54. Because the greater of the two amounts is 20% of the average monthly balance, or \$103.54, this is the amount plaintiff will be assessed as an initial partial payment of the filing fee. For this case to proceed, plaintiff must submit this amount on or before September 10, 2013.

In addition, plaintiff has filed a motion to use his inmate release account to pay the filing fee in this case. (Dkt. #2). The federal *in forma pauperis* statute suggests that prison officials are required to use a prisoner's release account to satisfy an initial partial payment if no other funds are available, *Carter v. Bennett*, 399 F. Supp. 2d 936, 936-37 (W.D. Wis. 2005), and the State of Wisconsin has conceded that the PLRA, 28 U.S.C. § 1915(b)(1), supersedes any restrictions state law imposes on the availability of funds in a prisoner's release account. Therefore, if sufficient funds do not exist in plaintiff's regular account to pay his initial partial payment, he should be allowed to use his release account to pay some or all of the assessed amount. This does not mean that plaintiff is free to ask prison officials to pay *all* of his filing fee from his release account. The only amount plaintiff must pay at this time is the \$103.54 initial partial payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from plaintiff's regular account whatever amount up to the full

amount plaintiff owes. Plaintiff should show a copy of this order to prison officials to ensure that they are aware they should send plaintiff's initial partial payment to this court.

ORDER

IT IS ORDERED that

1. Plaintiff Elpidio Juarez is assessed \$103.54 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$103.54 on or before September 10, 2013. If, by September 10, 2013, plaintiff fails to make the initial partial payment or show cause for his failure to do so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to plaintiff's filing his case at a later date.

2. Plaintiff's motion for use of release account funds, dkt. #2 is GRANTED in part. If sufficient funds do not exist in plaintiff's regular account to pay his initial partial payment, then the inmate account office at the New Lisbon Correctional Institution is to use plaintiff's release account to pay the remainder of the assessed amount.

Entered this 19th day of August, 2013.

BY THE COURT:

/s/
PETER OPPENEER
Magistrate Judge